

Stanford Law Review

Gender, Violence, Race, and Criminal Justice

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Source: *Stanford Law Review*, Vol. 52, No. 4 (Apr., 2000), pp. 777-807

Published by: Stanford Law Review

Stable URL: <http://www.jstor.org/stable/1229430>

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Gender, Violence, Race, and Criminal Justice

Angela P. Harris*

This essay examines the connection between violence and masculinity that leads men to appoint themselves the protectors of racialized communities and that constitutes its own interracial brotherhood linking lawbreakers and law enforcers. Feminists are familiar with the concept of "gender violence," but this term is usually used to denote violence by men against women. Yet exploration of the violence in the criminal justice system begins to reveal the extent to which masculine identity is shaped by relations of repulsion and desire between men. Indeed, this community of violence extends to state actors within the criminal justice system, most notably the police. Disrupting the cycle of gender violence both inside and outside the state is a race issue and a gender issue, as well as a criminal justice issue.

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* Professor of Law, University of California, Berkeley School of Law (Boalt Hall). This Commentary began as a keynote address at a 1996 conference on *Penalties, Prohibitions & Punishments: Who Can Get Justice in the United States?* at the University of Iowa College of Law. My thanks to the participants in that conference for helping me to develop my thoughts. Thanks go as well to the participants in the 1999 American University workshop on Gender, Work, and Family, for pointing me toward the literature of masculinities. Jerome Culp has been pressing me to understand the complexities of homosociality; he helped inspire this Commentary and provided helpful comments on a previous draft. Monika Batra provided timely and accurate research assistance as well as inspiration and encouragement. Finally, thanks to Tony Alfieri for quietly herding me toward the finish line.

INTRODUCTION

One early morning in August 1997, New York City police officer Charles Schwarz forcibly held down a Haitian immigrant named Abner Louima in a bathroom in the 70th Precinct while Schwarz's fellow officer Justin Volpe rammed a broken broomstick into Louima's rectum, rupturing his bladder and his colon, and then jammed it into his mouth.¹ Approximately twenty officers were working in the area while Louima was attacked, but no one came forward during the attack or demanded medical attention for Louima. "Instead, Louima was left to wait nearly three hours, bleeding in a holding cell, until an officer was assigned to accompany the paramedics to the hospital."² Meanwhile, officers saw Volpe brandishing a feces-stained stick around the stationhouse and bragging about how he had humiliated Louima. Four officers eventually came forward to report what had happened, but many suspected they did so only because of a widening federal investigation.³

In the end, Officer Volpe confessed and pleaded guilty to a civil rights violation; Officer Schwarz was convicted of violating Louima's civil rights. Three other officers—two accused of beating Louima in a police car before he got to the stationhouse and one, their supervisor, accused of trying to cover up the beating—were acquitted.⁴ Volpe said that he sodomized Louima because he mistakenly believed that Louima had punched him during a disturbance at a nightclub; as it turned out, the assailant at the nightclub was actually Louima's cousin.⁵

U.S. Attorney Zachary Carter called the attack "the most depraved act that's ever been reported or committed by a police officer or police officers against another human being."⁶ No one, however, suggested psychiatric help for Volpe and Schwarz or wondered why rape with a broken broomstick was a logical response to a punch. No one questioned their sexual orientation.⁷

1. See Tom Hays, *New York Officers Go on Trial in Alleged Torture Case*, PRESS-ENTERPRISE (Riverside, Cal.), May 5, 1999, available in 1999 WL 18889488 [hereinafter Hays, *New York Officers*].

2. Allyson Collins, *Justice Won't Prevail Until Blue Wall of Police Silence Comes Down*, HOUSTON CHRON., June 13, 1999, available in 1999 WL 3995543.

3. See *id.* (describing hesitancy of officers who witnessed attack in coming forward).

4. See *Mixed Verdict in Louima Torture Case*, STAR TRIB. (Minneapolis-St. Paul), June 9, 1999, available in 1999 WL 7501052.

5. See Tom Hays, *Police Mistakenly Set Out to 'Punish' Louima, Prosecution Says*, BUFFALO NEWS, June 2, 1999, available in 1999 WL 4559149.

6. See *Mixed Verdict*, *supra* note 4 (quoting Carter).

7. Mr. Louima's sexual orientation, however, was questioned. In his opening statement at trial, Marvyn Kornberg, Volpe's lawyer, suggested that Louima's internal injuries were "not consistent with a nonconsensual insertion of an object into his rectum" and stated that there was evidence of another man's DNA mixed in with Louima's feces found in the bathroom where he was tortured. Hays, *New York Officers*, *supra* note 1 (quoting Kornberg).

The racial meanings of incidents of police brutality such as the Louima beating and torture have been well explored.⁸ Less well explored have been the charged gender relations among men that make intelligible the manner of the Louima attack as well as its target. The attack on Louima can be understood not only as an act of racial violence but also as a racial attack accomplished through a peculiarly male language of sexual violence.⁹ On other occasions, the charged gender relations among men have made it possible for racial hostilities to be temporarily transcended by gender loyalty: the loyalty, for instance, to the "boys in blue" that protected Volpe and Schwarz for so long. In these and other ways, gender violence sometimes creates and sometimes shatters racial community.

Feminist legal theorists, of course, are well familiar with the concept of "gender violence," but for the most part they have focused only on violence against women.¹⁰ Feminist and queer theorists working in the area of sexual harassment law have recently demonstrated, however, that the concept of "sex-based" aggression is difficult, if not impossible, to confine to the heterosexual, cross-sex context in which it began.¹¹ Similarly, gender violence does not produce only female victims; indeed, since most victims of violent crime are male, it may be that more men than women suffer from gender violence. This does not mean that the traditional feminist focus on violence against women is wrong; the gender system operates precisely to disempower women as a class. But this recognition should not obscure the fact that hierarchies of race, class, sexual orientation, and *gender itself* also mark out groups of men as vulnerable to the violence of other men. Exploration of

8. For a close examination of the Louima incident and its legal aftermath, see generally Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999).

9. Alfieri suggests, for example, that "Volpe and the other arresting officers deploy[ed] physical and sexual forms of violence to underwrite their own masculinities, thereby asserting the supremacy of their own 'racialized masculinities' of whiteness." *Id.* at 1191.

10. Gender violence legislation has also been limited in focus. For example, the Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-703, 108 Stat. 1796, 1902-55 [hereinafter VAWA] (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.), contains a provision granting a civil rights cause of action against any "person . . . who commits a crime of violence motivated by gender," 42 U.S.C. § 13981(c) (1999), and allowing any party injured by such a crime to obtain compensatory and punitive damages as well as injunctive, declaratory, or other appropriate relief. *Id.* The implications of this statute for male-on-male violence, however, have not yet been explored; as the title of the Act implies, gender violence within the meaning of VAWA has so far been interpreted as male violence against women.

11. See generally, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that sex discrimination law should be reconceptualized by disaggregating gender from sex and sexual orientation); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (arguing that the meaning of sex needs to be recharacterized in law); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (discussing the conflation of sex, gender, and sexual orientation).

the violence in the criminal justice system—the violence of both private and public actors—begins to reveal the extent to which masculine identity is shaped by relations of repulsion and desire between men. That Volpe would sodomize Louima, when to be a heterosexual man is precisely to be terrified of homosexuality, presents a puzzle that is best understood not by reading Louima as symbolically female but by recognizing the powerful feelings men have for other men. These feelings, in turn, are shaped by cultural fantasies of race, nation, and sexuality.¹² In this Commentary, then, I want to suggest that investigations of violence and community, including investigations of racial violence, are incomplete without paying attention to gender violence among men.

In Part I, drawing on literature in sociology, I argue that the cultural structures of masculinity in the contemporary Anglo-American world divide men along familiar lines of race and class. The result, however, is not simply that some men are more powerful than others. Men disempowered by racial or class status develop alternative rebellious ways of proving their manhood; at the same time, “dominant” men may envy “subordinate” men, and rebellious men may long to be accepted into the mainstream. In addition to these complex relationships with one another, all men experience the pressure not to be women and not to be “faggots.” The instability of masculine identity in the face of all these pressures makes violence in defense of self-identity a constant possibility.

In Part II, drawing on literature in criminology, I argue that violent acts committed by men, whether these acts break the law or are designed to uphold it, are often a way of demonstrating the perpetrator’s manhood. I call this kind of violence “gender violence” and assert that men as well as women may be its victims. I argue as well that traditional practices of law enforcement incorporate or facilitate gender violence, whether it is directed at women, sexual minorities, or racial-ethnic minorities. Yet this violence within policing, though widely deplored, has not been effectively challenged.

In Part III, I argue that this complicity of the criminal justice state with gender violence is wrong because it causes unnecessary suffering and because it blocks our society from exploring possibly more effective ways of pursuing a truly safe society. At the end of the essay, I briefly describe some efforts, both theoretical and practical, to disrupt the convergence of gender violence with law and order.

12. In this Commentary, I focus on gender violence committed by men because statistics regularly reveal that men are more likely than women to commit violent crime, see JAMES W. MESSERSCHMIDT, *MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY 1* (1993); *Gender Differences Found*, YORK DAILY REC., Dec. 6, 1999, available in 1999 WL 22798825; and because, as I will argue, male gender violence is widely considered “normal” and sometimes necessary even while it is deplored. See *infra* text accompanying notes 57-77. I do not by any means intend to suggest, however, that women are not violent or that women never use violence as a way of asserting or protecting their feminine identity.

I. "DOING GENDER": GENDER PERFORMANCE AND THE PRECARIOUS STRUCTURE OF MASCULINE IDENTITY

Literary theorist Elaine Scarry argues that one of the properties of human pain is that its characteristics—its vibrancy, its reality, its certainty—can be transferred away from a human body and onto something else, something that in itself does not appear vibrant, real, or certain.¹³ In this sense, pain, and the violence that induces it, is a means of creation, a way of making ideas real, the way bloodless ideas such as property and sovereignty are made real in war and conquest by the presence of actual blood and the mutilation and destruction of human bodies.

Manliness is one of those ideas that is often made real with violence. Violent acts often carry idiosyncratic moral or emotional meanings to the perpetrator.¹⁴ But violent acts are also, sometimes, the result of the character of masculinity itself as a cultural ideal. In these cases, men use violence or the threat of violence as an affirmative way of proving individual or collective masculinity, or in desperation when they perceive their masculine self-identity to be under attack.

For some years now, feminist criminologists have insistently called attention to a fact that previously seems to have escaped criminology's notice: Criminals are overwhelmingly male. As criminologist James Messerschmidt observes,

[a]rrest, self-report, and victimization data all reflect that men and boys both perpetrate more conventional crimes and the more serious of these crimes than do women and girls. Men also have a virtual monopoly on the commission of syndicated, corporate, and political crime Indeed, gender has consistently been advanced by criminologists as the strongest predictor of criminal involvement.¹⁵

Men predominate not only in crime but also in criminal justice. Policing, for example, has traditionally been a male occupation. Messerschmidt observes that "until the 1970s, women officers engaged in such 'feminine'

13. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 13-14 (1985).

14. See JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 9 (1988) (arguing that central to many criminal acts, including hot-blooded and cold-blooded murder, is one of a "family of moral emotions: humiliation, righteousness, arrogance, ridicule, cynicism, defilement, and vengeance"). The most extreme acts of violence may be a response to the intolerable pain of feeling dead inside. Thus, psychiatrist James Gilligan, having studied violent men in prisons, argues that

only the living dead could want to kill the living. No one who loves life, who cherishes and feels his own aliveness, could want to kill another human being. But the living dead need to kill others, because for them the most unendurable anguish is the pain of seeing that others are still alive.

JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 32 (1996).

15. MESSERSCHMIDT, *supra* note 12, at 1 (citations omitted).

functions as working primarily with juveniles, women offenders, women victims, vice-squad assignments, and community relations Although by the 1970s women were increasingly assigned to routine patrol duty, today [1989] less than 10 percent of all police officers are women."¹⁶ Nearly ten years later, the numbers had not improved significantly. The National Center for Women and Policing (NCWP) found that "[a]mong the largest law enforcement agencies in the country in 1998, women comprise[d] only 13.8% of all sworn law enforcement positions."¹⁷ A similar history and continuing gender asymmetry holds for jobs in corrections.¹⁸

Some researchers suspect the cause for this startling sex difference is biological in origin.¹⁹ Sociologists, true to their discipline, are instead interested in the systems of social meaning that link crime with masculinity.²⁰ The literature on "masculinities" suggests that men are disproportionately violent, at least in part, because being violent is one socially recognized way of being a man.²¹ Some background on the major premises of this literature may be useful.

Sociologists of gender argue that gender is not something one has but, rather, something one does.²² Moreover, the fact that men are divided by race, ethnicity, religion, class, and sexual orientation means that there is not just one kind of masculinity.²³ Rather, theorists of masculinity speak of rela-

16. *Id.* at 175 (citations omitted).

17. NATIONAL CENTER FOR WOMEN & POLICING, *EQUALITY DENIED: THE STATUS OF WOMEN IN POLICING* 1998, at 1 (visited Oct. 31, 1999) <<http://www.feminist.org/police/status1998.html>> [hereinafter NCWP].

18. See generally SUSAN EHRLICH MARTIN & NANCY C. JURIK, *Women in Corrections: Advancement and Resistance*, in *DOING JUSTICE, DOING GENDER: WOMEN IN LAW AND CRIMINAL JUSTICE OCCUPATIONS* 157 (1996) (examining the history of women's employment in corrections).

19. See, e.g., JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 70 (1985) ("[C]ertain human features that are indisputably biological—an individual's anatomical configuration—are correlated with criminality.").

20. See, e.g., MESSERSCHMIDT, *supra* note 12, at 27 ("[B]oth gender and crime are social phenomena.").

21. See, e.g., *id.* at 110 (arguing that, for lower-working-class racial minority boys, participation in street violence "demonstrates to closest friends that one is 'a man'").

22. See, e.g., Candace West & Don H. Zimmerman, *Doing Gender*, 1 *GENDER & SOC'Y* 125, 157 (1987) ("Doing gender means creating differences between girls and boys and women and men, differences that are not natural, essential, or biological. Once the differences have been constructed, they are used to reinforce the 'essentialness' of gender.").

23. This view of the relationship between gender, race, class, and sexuality thus differs from the "intersectionality" metaphor used by many critical race feminists. See, e.g., Kimberlè Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 111, 113-20 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw eds., 1993) (arguing that the tendency to see race and gender as exclusive or separable categories is limiting). It lies closer to what Darren Lenard Hutchinson calls "multidimensionality" and Peter Kwan calls "cosynthesis." See Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561, 641 (1997) (noting that, whereas "intersectionality" suggests a convergence of otherwise separate and independent

tions of alliance, dominance, and subordination among different sorts of masculinity.²⁴ Indeed, some writers in the field always speak of “masculinities” in the plural to emphasize the point.²⁵ Thus, though one way of doing masculinity may be “hegemonic” (i.e., dominant) within a friendship network or a social institution, there may be many other ways of being a man that conflict, compete, or form a relationship of interdependence with the hegemonic form.

The hierarchies of race and class, for example, give rise to power struggles among men. Sociologist Karen Pyke argues that “white heterosexual middle- and upper-class men who occupy order-giving positions in the institutions they control—particularly economic, political, and military institutions—produce a hegemonic masculinity that is glorified throughout the culture.”²⁶ African American men have long argued that they are “emasculated” by white supremacy, both materially and culturally.²⁷ Materially, emasculation means that African American men have been denied the privileges of hegemonic masculinity, including patriarchal control over women, jobs that permit one to exercise technical mastery and autonomy, and the financial and political power that enables control over others. Culturally, African American men have been stereotyped by whites as docile and child-like in antebellum times, and in postbellum times as violent, unable to control their physical and sexual urges, and unintelligent. This latter set of stereotypes allows white men to see themselves as superior: Though African American men may possess a brutish maleness, they are lacking in the men-

categories, “multidimensionality” emphasizes inseparability); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1275-76, 1280 (1997) (rejecting “intersectionality” as forcing a choice of one identity over another and suggesting that “cosynthesis” offers the message that “the multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted”).

24. See, e.g., R.W. CONNELL, MASCULINITIES 37 (1995) (“We must also recognize the *relations* between the different kinds of masculinity: relations of alliance, dominance[,] and subordination.”).

25. See, e.g., Paul Smith, *Introduction* to BOYS: MASCULINITIES IN CONTEMPORARY CULTURE 3 (Paul Smith ed., 1996) (“[M]asculinity is *not*; rather, there are only *masculinities* in the plural, defined and cut through by differences and contradictions of all sorts.”).

26. Karen D. Pyke, *Class-Based Masculinities: The Interdependence of Gender, Class, and Interpersonal Power*, 10 GENDER & SOC’Y 527, 531 (1996).

27. For a pioneering academic analysis of black male gender trouble, see generally ROBERT STAPLES, *BLACK MASCULINITY: THE BLACK MALE’S ROLE IN AMERICAN SOCIETY* (1982). At the grassroots level, a passionate debate continues over whether the restoration of patriarchal control, especially sexual control, over women will restore wholeness to black men and thereby advance the race, or whether the adoption of a feminist analysis of power relations would allow black men to join black women on the path toward racial liberation. Compare, e.g., SHAHRAZAD ALI, *THE BLACKMAN’S GUIDE TO UNDERSTANDING THE BLACKWOMAN* at viii-x (1989) (arguing for female submission), with JILL NELSON, *STRAIGHT, NO CHASER: HOW I BECAME A GROWN-UP BLACK WOMAN* 213-14 (1997) (arguing for resistance to patriarchy).

tal and moral qualities that are necessary for "civilized" men: gentlemen, patriarchs, rulers.²⁸

In response to this denial of access to "full" manhood, African American men have constructed rebellious forms of manhood, such as the inner-city "cool pose" that presumes black superiority and white impotence.²⁹ Building on and subverting racist stereotypes, working-class and poor black men may aspire to a masculinity that emphasizes physical strength, mental control, and sexual prowess. Or they may aspire to a masculinity of physical grace, personal style, and creative artistry. At the material level, these alternative ways of being a man remain marginal: White men's greater control over political, economic, and social resources and their tighter grip on dominance remain. At the cultural level, however, these competing forms of masculinity allow for interracial relations of envy and desire as well as mutual hostility. Observers of African American alternative masculinities argue that black men, while expressly denigrating white men and white masculinity, also pay homage to the white masculine ideal.³⁰ Meanwhile, racist stereotypes leave room for a sneaking desire and envy on the part of white men for the supposed sexual potency, athleticism, and sensual physicality of black men. The relations between white and black men, then, are more complex than "dominant" and "subordinate"; men divided by racial power may look at one another with admiration, envy, or desire.

A similarly complex relationship among various forms of manhood emerges from the dynamics of class. For example, Karen Pyke argues that the dominant form of masculinity in American society stresses the importance of intellectual mastery, technological prowess, and the rationalized

28. For a cultural historical account of the nineteenth-century crisis in male identity that gave rise to the notion of savage "masculinity" as distinct from civilized "manliness," see generally GAIL BEDERMAN, *MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917* (1995).

29. See generally RICHARD MAJORS & JANET MANCINI BILLSON, *COOL POSE: THE DILEMMAS OF BLACK MANHOOD IN AMERICA* (1992). Majors and Billson argue that coolness, like the dominant masculinity of rationalized self-restraint and control over others, is a discipline of self-mastery. See *id.* at 38. The practice of cool means suppressing one's emotions and presenting a perfectly controlled face to the world: Even explosions of rage are strategic and can be turned on and off. Cool pose also emerges as a response to the economic, political, and cultural disempowerment poor African Americans face and the racial microaggressions of everyday life. See *id.* at 2. Cool pose means demanding respect from others, whether in encounters with strangers on the street (where inappropriate staring may lead to violence) or in one's closest intimate relations. The individual obsession with respect and its opposite, disrespect, reflects the awareness that black men as a class are given anything but respect in Anglo-American cultural life. As Majors and Billson note, "[p]ride, dignity, and respect hold such a high premium for black men that many are willing to risk anything for it, even their lives." *Id.* at 39.

30. Majors and Billson observe, for instance, that "African-American men have defined manhood in terms familiar to white men: breadwinner, provider, procreator, protector." *Id.* at 1. This affirmation of hegemonic masculinity has led some people in the African American community to urge black women to submit to the patriarchal authority of black men as a way of making black men whole. See, e.g., ALI, *supra* note 27, at viii-x.

control of behavior (both one's own behavior and the behavior of others).³¹ Men denied access to this masculinity—because they are working class and take orders rather than give them, or because they lack the education and training to exhibit technological prowess—often resort to “hypermasculinity” (the exaggerated exhibition of physical strength and personal aggression) in an attempt to gain social status. In the process, however, these working-class men confirm the assumptions of middle- and upper-class men about their own superiority. Pyke gives an example:

The hypermasculinity found in certain lower-status male locales, such as on shop floors, in pool halls, motorcycle clubs, and urban gangs, can be understood as both a response to ascendant masculinity and its unintentional booster. With their masculine identity and self-esteem undermined by their subordinate order-taking position in relation to higher-status males (which potentially delegates them to the role of “wimps”), men on the shop floor reconstruct their position as embodying true masculinity They use the physical endurance and tolerance of discomfort required of their manual labor as signifying true masculinity, an alternative to the hegemonic form associated with managers. They rely on this “compensatory” masculinity to symbolically turn the tables against managers, whom they ridicule as conforming “yes-men” and “wimps” engaged in effeminate paper-pushing kinds of labor To further compensate for their subordination, some lower-status men also engage in pervasive talk of their sexual prowess and a ritualistic put-down of women, who are viewed as passive and dependent Middle- and upper-class men, on the other hand, who display the more civilized demeanor of polite gentility, express disdain for the ostentatious displays of exaggerated masculinity and misogyny among lower-class male subcultures In so doing, privileged men reaffirm their superiority over lower-class men and disguise themselves as exemplars of egalitarianism in their interpersonal relations with women. This serves to cover up the gendered power advantages of higher-class men that are built into the institutions they control and camouflaged by an aura of merit and righteousness that accompanies their privileged position³²

While social stratification along lines of race and class separate men from one another and engage them in relations of competition, envy, and desire, masculinities of all varieties share in common the requirement that men establish themselves on the ground of what they are not. One of the great contributions of feminism has been to make plain that men achieve masculinity at the expense of women: at best by being “not a woman,” at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women. Even in male-male relations, the domination of men over women arguably continues to function: Men in all-male groups often prove their individual and collective manhood by symbolically reducing others in the

31. See Pyke, *supra* note 26, at 531 (“[W]hite heterosexual middle- and upper-class men who occupy order-giving positions in the institutions they control—particularly economic, political, and military institutions—produce a hegemonic masculinity that is glorified throughout the culture.”).

32. *Id.* at 531-32 (citations omitted).

group to women and abusing them accordingly.³³ Men's need to defend themselves at all costs from being contaminated with femininity can be found in as mundane and seemingly trivial phenomena as children's play and the reluctance of married men to do housework or take care of the children.³⁴

The feminist movement has focused critical attention on woman-hating as a cornerstone of masculinity. But queer theorists have recently begun to argue that relationships between men are as important as those between men and women in forming masculine identity.³⁵ The argument is that not being

33. One of the most ferocious examples of this dynamic emerges from prison life. Sociologists argue that the need to defend a masculine identity is crucial for prisoners, since many other characteristics of the prison environment are feminizing or infantilizing: Prisoners lose their autonomy and independence, must submit to the authority of guards, are stigmatized as unwanted by society, and have reduced access to wealth, income, and material goods. See, e.g., GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 64-79 (1958) (describing the "pains of imprisonment" that affect prisoners' masculine self-image: deprivation of liberty, goods and services, heterosexual relationships, autonomy, and security); Carolyn Newton, *Gender Theory and Prison Sociology: Using Theories of Masculinities to Interpret the Sociology of Prisons for Men*, 33 *HOW. J. CRIM. JUST.* 193, 196-97 (1994) (discussing the deprivations of imprisonment, including a lack of autonomy, powerlessness in the face of authority, limited access to material goods, and a lack of security). The dominant individual response to this gender threat is a kind of "hypermasculinity" expressed through the physical and sexual domination of others. As prisoners rape, sexually coerce and abuse, and harass each other, and even as more or less affectionate and consensual sexual relations among them develop, imprisoned men use the language of gender to divide the strong from the weak: Men who are raped or are considered the weaker partner in a dominative relationship are "bitches" or are referred to using female pronouns. See James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 *AM. CRIM. L. REV.* 1, 9 (1999) (describing statements that feminize the inmate as one form of sexual victimization in prisons).

34. Psychoanalytic theorists explain this dynamic as a result of children's psychic development in a society where women do the bulk of the caretaking: In order to distinguish themselves as male, little boys must separate from Mother, whereas little girls are free to remain entangled with her. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 173 (1978) ("Girls and boys develop different relational capacities and senses of self as a result of growing up in a family in which women mother."). Other theorists point to the nineteenth-century shift from household governance to success in the marketplace as the basis of masculine identity and authority and argue that the shift is the reason why men are reluctant to do caretaking work. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 25-30 (2000).

35. Indeed, the distinction between men and women is not altogether separate from the distinction between homosexual and heterosexual in contemporary Western society. Several theorists have argued that gender identity in Western society is based on a conflation of three distinct attributes: "sex" (an attribute considered to be biological), "gender" (the social attribute of being masculine or feminine), and "sexual orientation" (the social label given one's sexuality). See generally, e.g., Case, *supra* note 11 (noting the importance of maintaining distinctions among terms of sex, gender, and sexual orientation); Franke, *supra* note 11 (arguing that this disaggregation is a fundamental flaw in equality jurisprudence); Valdes, *supra* note 11 (documenting how courts have simultaneously embraced and denied aspects of this conflation of categories, which renders anti-discrimination laws underinclusive). This conflation has even greater ramifications when coupled with the "heteropatriarchal" character of Western society: That is, masculinity and femininity are defined as opposites, where masculinity is superior, and heterosexuals and homosexuals are defined as opposites, where heterosexuality is superior. This means that, under dominant social conventions, if you are born anatomically male, you should act in a "masculine" fashion at all times and

a "faggot" is as important to being a man as not being a woman. Yet disavowing homosexuality is not as simple as it might seem. First, of course, many men, whether they define themselves as straight, gay, or something else, may feel desire for other men. Even if this is not the case, however, in order to achieve success as a man one must often establish the very close emotional and physical bonds with other men that make one vulnerable to the charge of homosexuality. The result, queer theorist Eve Kosofsky Sedgwick argues, is a constant state of anxiety:

[A]t least since the eighteenth century in England and America, the continuum of male homosocial bonds has been brutally structured by a secularized and psychologized homophobia, which has excluded certain shiftingly and more or less arbitrarily defined segments of the continuum from participating in the overarching male entitlement—in the complex web of male power over the production, reproduction, and exchange of goods, persons, and meanings. . . . Because the paths of male entitlement, especially in the nineteenth century, required certain intense male bonds that were not readily distinguishable from the most reprobated bonds, an endemic and ineradicable state of what I am calling male homosexual panic became the normal condition of male heterosexual entitlement.³⁶

Sedgwick's argument is that Western masculinity from the eighteenth century onward has placed men in a double bind: In order to be true men, they must not be homosexual; yet many paths toward hegemonic masculinity—such as sport, battle, and mentorship—involve just the sort of close, emotionally intense, and frequently physical and sexually charged relationships that subject men to the suspicion that they are homosexual. According to Sedgwick, there are two main results of this double bind: "first, the acute *manipulability*, through the fear of one's own 'homosexuality,' of acculturated men; and second, a reservoir of potential for *violence* caused by the self-ignorance that this regime constitutively enforces."³⁷

The military provides one such example. As Sedgwick points out, the military is a place where both men's manipulability and their capacity for violence is at a premium.³⁸ As is true elsewhere in the culture, the privileges

desire only women. Failure to uphold one of the two social attributes of this triangle means consequences for the other: Thus, a "sissy" or "tomboy" is usually suspected of being a "queer" or "dyke," respectively, and the man who is suspected of being gay not only becomes subject to discrimination on that basis, but also jeopardizes his claim to manhood itself.

36. EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 185 (1990). Less psychoanalytically oriented feminist theorists also argue that "anxiety" perpetually haunts masculine identity. Joan Williams, for example, argues that, "[a]s men's breadwinner status came to underlie their claims to familial and social dominance, anxiety became a permanent feature of masculinity." WILLIAMS, *supra* note 34, at 26.

37. SEDGWICK, *supra* note 36, at 186.

38. *See id.* Some evidence suggests that one way in which the psychological tension produced by these relations of prohibition and intimacy has been traditionally released in the military is through sexuality. Steven Zeeland, for example, based on informal interviews with Navy personnel, reports that military culture is intensely sexual, and that military men frequently have sex not

of masculinity require that one establish intimate relationships with other men; yet the very closeness of these bonds provokes the terror of being marked homosexual and of losing one's masculine privileges. The instability of masculine identity under these circumstances makes insecure men easily manipulable (anxious and eager to prove their masculinity) and potentially violent (for not only status but also personal identity itself is at stake). The military both exemplifies and shrewdly exploits the internal structure of masculinity: Military culture, like prison culture, both seeks to make men doubt their own masculinity and encourages them to prove their manhood through violence and casual sexuality.³⁹

This account of contemporary hegemonic masculine identity suggests that violence—whether directed at women, at other men, or at oneself—is never far below the surface. Men must constantly defend themselves against both women and other men in order to be accepted as men; their gender identity, crucial to their psychological sense of wholeness, is constantly in doubt. In the next section, I argue that, under these circumstances, gender performance frequently becomes gender violence.

II. CRIME AND PUNISHMENT AS GENDER PERFORMANCE

Franklin E. Zimring and Gordon Hawkins have argued that the United States does not have a "crime problem"; rather, it has a "violence problem."⁴⁰ The immediate cause of this problem is, of course, the availability of handguns. The deeper cause may have to do with the structure of masculine identity. Some men routinely use violence or the threat of violence as a way of presenting themselves as masculine. Other men, ordinarily nonviolent, may on occasion transform intolerable feelings of shame and humiliation into rage and commit violent acts to protect their sense of masculine identity. Men in groups sometimes use violence to raise or protect their esteem in the

only with prostitutes but with one another without identifying themselves as gay. Indeed, Zeeland suggests that the psychological double bind that Sedgwick portrays as creating homosexual panic also allows many men to indulge in male-male sex and intense male-male emotional relationships without describing themselves as gay. See generally STEVEN ZEELAND, BARRACK BUDDIES AND SOLDIER LOVERS: DIALOGUES WITH GAY YOUNG MEN IN THE U.S. MILITARY (1993).

39. For more on the sexist and homophobic aspects of military culture, see generally Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996). For an analysis of the symbolic connections between the armed forces and masculinity and their implications for women and people of color, see generally Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

40. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA at xi-xii (1997) (arguing that crime and violence are separate problems and that focusing on the causes of violence is a more effective strategy of harm prevention).

eyes of other men or their comrades. Some of these violent acts violate the law. Some of these violent acts are committed in the name of the law.⁴¹

A. *Gender Violence and Lawbreaking*

The link between doing crime and doing gender has received a fair amount of attention from sociologists. For example, Jack Katz argues that the violent crimes of some men are part and parcel of a masculine persona to which these men aspire, the desired image being that of the impervious coldness of the "hardman" or the crazy, unpredictable "badass."⁴² But gender-based criminal violence is not limited to such men. Ordinarily law-abiding and peaceful men may find themselves committing violent criminal acts when (in public settings) their manhood is threatened by conflict with other men or when (in private settings) women threaten to reveal them as sexually inadequate, fail to submit to their patriarchal authority, or threaten to leave them. In these situations, the potential loss of masculinity brings shame and humiliation, and the man who finds these emotions intolerable may turn them into rage and act violently in expression of that rage.⁴³

41. In making this argument, again I must stress that I do not want to be understood as saying that women are not violent, that they do not dominate others, or that they do not commit crimes. Although some "cultural feminists" do make such arguments, I do not believe that women are somehow naturally and inherently peaceful and law abiding. Women do drugs; they steal, embezzle, and defraud; they prostitute themselves and others; they mistreat, neglect, torture, sexually abuse, and sometimes kill children; they assault and sometimes kill strangers, lovers, and husbands; and they commit hate crimes. Indeed, incarceration rates for women are rising much faster than those for men. See Terry Carter, *'Equality with a Vengeance': Violent Crimes and Gang Activity by Girls Skyrocket*, A.B.A. J., Nov. 1999, at 22. But men continue to be disproportionately represented in prisons and jails, as well as in policing and corrections, see note 12 *supra* and text accompanying notes 16-18; violence, whether aggressive or protective, is culturally associated with men; and the violent acts that women commit are less likely to constitute attempts to prove their femininity.

42. Katz argues, for example, that one requirement of being the "heavy" in armed robbery is that one "become a hardman, one who will appear ready to back his intentions violently and remorselessly, outside and independent of the situated interaction of robbery." KATZ, *supra* note 14, at 218. Part of the appeal of being a hardman, Katz argues, is the promise of mastering, through sheer force of personality, the chaos that a life of crime and constant "action" generates. See *id.* at 225. The project of being a hardman involves "imposing a cold, hard, violent discipline. For many, it means the humiliation and often the physical abuse of women." *Id.* at 228. Becoming a hardman, in other words, is a masculine gender project.

43. "Humiliation always embodies an awareness of impotence," remarks Katz. *Id.* at 24. Conversely, impotence—literal or figurative—always brings with it the threat of humiliation. Katz's analysis connects humiliation to male gender identity since women cannot be impotent.

Gilligan, based on interviews with violent criminals, argues that the main motives for violence are "the fear of shame and ridicule, and the overbearing need to prevent others from laughing at oneself by making them weep instead." GILLIGAN, *supra* note 14, at 77 (1996). Gilligan also connects this emotional dynamic explicitly with gender:

The male gender role generates violence by exposing men to shame if they are not violent, and rewarding them with honor when they are. The female gender role also stimulates male violence at the same time that it inhibits female violence. It does this by restricting women to the

The need to be seen as a man by other men may require violence. Sociologists Dov Cohen and Joe Vandello describe "cultures of honor" as sharing "a common conception of the insult as something that drastically reduces one's social standing and a belief that violence can be used to restore that standing once it has been jeopardized."⁴⁴ In this kind of culture, they argue,

people react not just to physical threats but to verbal affronts and insults as well because these are the probes by which one man tests another to see what he is made of. Letting infractions to honor go unanswered amounts to announcing that one is soft or can be walked over with impunity.⁴⁵

As the slide from "people" to "man" in the quote suggests, Cohen and Vandello's "cultures of honor" involve relations among men.⁴⁶ Criminal law casebooks are full of homicides that emerge from seemingly trivial encounters between men who are strangers to one another, interactions that would seem inexplicable unless it is understood that manhood is at stake.⁴⁷

Another distinctively masculine form of humiliation that may quickly lead to rage and then criminal violence occurs not in public among other men, but in "private" in connection with women.⁴⁸ For example, both actual

role of highly unfree sex objects, and honoring them to the degree that they submit to those roles or shaming them when they rebel. This encourages men to treat women as sex objects, and encourages women to conform to that sex role; but it also encourages women (and men) to treat men as violence objects. It also encourages a man to become violent if the woman to whom he is related or married "dishonors" him by acting in ways that transgress her prescribed sexual role.

Id. at 233.

44. Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567, 569 (1998).

45. *Id.* at 570.

46. In traditionally patriarchal cultures, men possess honor, and women virtue; both honor and virtue are expected to be defended violently, but only by males. In the white slaveholding South, for example, white women were expected to demonstrate a "pride of womanhood," but this pride was seated in the possession of virtue, demonstrated in qualities such as modesty, chastity, passivity, and refinement, and understood as a touching lack of familiarity with the rough realities of life. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 166-76 (1998). In such a culture, insults to a woman and her virtue were expected to be avenged violently by her father, brothers, or husband, but not by the woman in question or any of her female relatives. Indeed, a woman who defended her own virtue aggressively would further put it into question, for such behavior would be "unladylike."

47. The criminal doctrines of "heat of passion" manslaughter and self-defense provide insight into local and national cultures of male honor. A few examples from the criminal law casebook I use are *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973) (the defendant fatally shot the victim after the victim and his friends came to remove the windshield wipers from the defendant's car and various hostile words were exchanged); *People v. Conley*, 543 N.E.2d 138 (Ill. Ct. App. 1989) (the defendant struck the victim in the face with a wine bottle, causing permanent damage, after one group of high school boys at a party was approached by another group of boys, who apparently thought that someone in the first group had said something derogatory); and *State v. Schrader*, 302 S.E.2d 70 (W. Va. 1982) (in the course of an argument about the authenticity of a German sword that the defendant had purchased from the victim, the defendant stabbed the victim fifty-one times with a hunting knife).

48. Indeed, Gilligan argues that women pose a major threat to men's honor, because "men delegate to women the power to bring dishonor on men. That is, men put their honor in the hands of 'their' women." GILLIGAN, *supra* note 14, at 230.

humiliation by women and the fear of being humiliated play a large role in men's accounts of why they rape women. Rapists tend to experience themselves as the humiliated victims of female sexual power. As one man succinctly noted, "Just the fact that they can come up to me and just melt me and make me feel like a dummy makes me want revenge."⁴⁹ Similarly, researchers of domestic violence interpret the actions of some men who batter women as efforts to establish and maintain male dominance.⁵⁰ In other instances, men beat or kill their wives or girlfriends when the women attempt to leave the relationship. In these cases, criminal violence emerges not simply out of the desire to control, but out of an extreme emotional dependence, coupled with an unwillingness or inability to see the woman as a separate and independent person.⁵¹ In this form of love, masculine style, a woman's attempt to end the relationship is experienced as an intolerable threat to the self: "If I can't have her, no one can" is the response.

In the situations I have described, individual men resort to violence when other men or women threaten their masculinity. Another dynamic that produces criminal gender violence emerges from the behavior of men in groups. The violence of street gangs provides an example. Katz argues that these gangs, which are usually made up of very young men, use violence as a way of heightening the drama of their moral and sensual lives and as a way of demanding that others take them seriously as adults rather than children:

In the hands of adolescent street elites, violence has a constructive power sufficient (1) to transform the significance of their principles of association from demeaning indications of childhood to the social requirements for glorious combat, (2) to establish a metaphor of sovereignty respected by peers, observed by the police, and duly reported by the mass media, and (3) most essentially, to sustain the claim of elite status in an aura of dread.⁵²

Each of these goals is accomplished by using violence in the service of masculine gender performance.⁵³ The lords, kings, and princes whose names

49. TIMOTHY BENEKE, *MEN ON RAPE* 42 (1982) (quoting "Jay," a twenty-three-year-old file clerk living in San Francisco).

50. See R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 *VICTIMOLOGY* 426, 438-39 (1978) (arguing that violence by men against their wives represents the attempt to establish and maintain a patriarchal social order).

51. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1, 65 (1991) (reporting that men who kill their wives frequently express the fear that the woman was about to abandon him, even if this was not the case); see also Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 *S. CAL. REV. L. & WOMEN'S STUD.* 71, 92 (1992) (noting that, in study of men who killed their wives, the men described their marital relationship as a central feature in their lives, "suggesting an obsessiveness with the woman and emotional dependency characteristic of abusive men").

52. KATZ, *supra* note 14, at 135.

53. Consider, for example, the second goal: the pursuit of sovereignty. As Katz notes, "A universal rationale for violence among street elites is their claims to control landmarks of a particular residential area: street boundaries, 'turf,' local food outlets, parks, or particular benches in parks." *Id.* at 118. In this way, rebellious masculinities pay homage to images of dominant mascu-

have traditionally been taken by gangs exemplify glorious and hegemonic manhood. Membership in a gang serves many different purposes, but one of them is the desire to establish unquestioned masculinity.

Wealthier, more privileged young men have their own brotherhoods from which violence may emerge. Criminologists Patricia Yancey Martin and Robert A. Hummer argue, for example, that campus "fraternities create a sociocultural context in which the use of coercion in sexual relations with women is normative and in which the mechanisms to keep this pattern of behavior in check are minimal at best and absent at worst."⁵⁴ Because fraternities promote masculine brotherhood as the center of campus social life and treat the casual use of women as an important element of the brotherhood, date rapes and even occasional gang rapes can be expected to occur with depressing regularity.

Finally, men in groups may engage in "hate crimes" and other spontaneous violent attacks as a way of performing their gender. In one survey of gay men and lesbians who were the victims of bias crimes, it was noted that the perpetrators commonly boasted about their own alleged hyperheterosexuality while attacking men, and derided feminism and women in general while attacking women.⁵⁵ This violence was, then, as much about the perpetrators' purportedly secure and superior masculinity as it was about bigotry. Indeed, criminologist Jana L. Bufkin argues that these displays of hypermasculinity are connected with nationalist pride. As Bufkin comments, "These individuals obviously wish to separate themselves from all that is feminine and non-heterosexual and feel as though they are American heroes when the task is completed."⁵⁶

In a wide variety of situations, then, male criminal violence is gender violence. The term "gender violence" should not be used to ignore the currents of race, ethnicity, religion, and sexuality that shape who becomes a victim and who a perpetrator. But I want to suggest that, when studying racial violence and other kinds of bias crimes, we should not forget about the codes of gender that make this violence explicable; similarly, when studying violence against women, we should place it in the context of gender violence as a whole.

linity: Just as the task of protecting home and country is considered a man's job in the dominant society, gang members take on the protection of their local turf as part of their sovereign power. See *id.*

54. Patricia Yancey Martin & Robert A. Hummer, *Fraternities and Rape on Campus*, in *CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE* 157, 158 (Kathleen Daly & Lisa Maher eds., 1998).

55. See Jana L. Bufkin, *Bias Crime as Gendered Behavior*, 26 *SOC. JUST.* 155, 160-61 (1999).

56. *Id.* at 161.

B. *Gender Violence and Law Enforcement*

In the preceding section, I focused on “law-breaking” gender violence committed by private individuals and groups. But law enforcement officials also engage in gender violence and, because they are also state actors, their violence is especially troubling.

Speaking of street gangs, Katz observes:

The economic and emotional realities of contemporary ghettos may be terrible, but the violence to which adolescent fighting groups primarily respond is not that of muggers, rapists, child abusers, robbers, or desperate drug addicts; it is the violence of other adolescent ghetto fighting groups. The violent threat and the militaristic response exist in the same social circle. In a usually implicit, cooperative manner, adolescent street elites collectively sustain antagonistic relations in which each effectively causes the other's existence.⁵⁷

A similar kind of mutually antagonistic yet interdependent relationship exists between some types of male criminals and the police. Street gangs and elite police squads are bitter enemies, but they are also united in a kind of masculine community.

Violence and masculinity converge in the sociological notion of “hyper-masculinity”: a masculinity in which the strictures against femininity and homosexuality are especially intense and in which physical strength and aggressiveness are paramount. Police work has traditionally been coded hypermasculine. As criminologist James Messerschmidt succinctly puts it, “Police work is defined culturally as an activity only ‘masculine men’ can accomplish.”⁵⁸ The cultural image of a police officer is a uniquely valuable and rare kind of man: tough and violent, yet heroic, protective, and necessary to society's very survival. In a sense, the police officer is expected to be the mirror image of the paradigmatic criminal, the violent thug who threatens the lives and safety of innocent citizens. Criminals use violence in the service of evil; cops use violence to overcome evil.

The close association of hypermasculinity with police work emerges in the very qualifications for the job. For example, police departments have traditionally been organized according to chains of command and rankings similar to those found in the military. The military metaphor is repeated in the war rhetoric police and politicians frequently use and in the weaponry relied upon for “fighting” crime. The close tie between policing and soldiering is reflected in police hiring policies: The NCWP 1998 report, for example, found that 61.4% of agencies surveyed reported that they give preference to candidates who are veterans or have previous military experience.⁵⁹

57. KATZ, *supra* note 14, at 128.

58. MESSERSCHMIDT, *supra* note 12, at 175.

59. NCWP, *supra* note 17, at 2.

Size requirements and entry exams that emphasize upper-body strength also assume that policing requires that one be able to physically dominate others. Indeed, the ability to physically brutalize others, especially other men, is often explicitly considered a qualification for the job. As Los Angeles police officer Mark Fuhrman (who became notorious during the O.J. Simpson murder trial for the taped racist rantings used to impeach his credibility) was quoted as saying, "You've got to be able to shoot people, beat people beyond recognition. . . . [Women] don't pack those qualities."⁶⁰

Hypermasculinity also characterizes the policing style favored by most departments. As the NCWP argues, "Law enforcement agencies continue to promote an outdated model of policing by rewarding tough, aggressive[,] even violent behavior. This 'paramilitary' style of policing results in poor community relations, increased citizen complaints, and more violent confrontations and deaths."⁶¹

Class provides the energy for much of this hypermasculinity: Beat cops tend to be working-class men, men denied the masculinity of wealth, power, and order giving. The dynamic of competing masculinities—hegemonic, authoritative masculinity versus rebellious, physical masculinity—is indicated by the gendered language cops use to distinguish types within police work itself. Messerschmidt notes, for example, that police construct "office cops" and the work they do—public relations and administration—as feminine while "street cops" are masculine.⁶²

The experience of street policing is deeply steeped in a masculine culture of brotherhood that rests on the division between "us" and "them." Although "us" is supposed to refer to honest citizens and "them" to lawbreakers, often "us" becomes simply a mirror image of "them": our guys against their guys.

Indeed, in some ways, the police are what street gangs aspire to be: sovereign protectors of turf, defenders of the innocent, and possessors of a monopoly on violence and moral authority. They are the baddest "mofo's" on the block. And, like the gangs they are dedicated to eradicating, law en-

60. Katherine Spillar & Penny Harrington, *The Verdict on Male Bias: Guilty*, L.A. TIMES, May 16, 1997, available in 1997 WL 2211349 (quoting Fuhrman). Note Fuhrman's use of the word "packing," a term that refers both to carrying a weapon and displaying the bulge of one's penis.

61. NCWP, *supra* note 17, at 3.

62. See MESSERSCHMIDT, *supra* note 12, at 178. Messerschmidt quotes researcher Jennifer Hunt: "High-ranking administrators were also viewed as 'inside tit men,' 'asskissers[.]' and 'whores' who gained their positions through political patronage rather than through superior performance in the rescue and crime-fighting activities associated with 'real police work.'" *Id.* (quoting Hunt). It should be noted that these highly gendered labels also represent class resentment: Those higher in police department management are generally better educated and perhaps better paid than street cops. Thus, those in administration have access to the hegemonic masculinity of authority, control, and technical mastery; "street cops," in turn, respond to being made to feel inferior and feminized by presenting themselves as hypermasculine.

forcement officers share a commitment to masculine ideals, moving within a culture of honor in which respect must be paid or violence will follow.⁶³

The everyday practices of law enforcement officers reflect this logic. Katz observes that the names that working-class gangs give themselves often evoke images of sovereignty such as "Lords" and "Princes."⁶⁴ A recent newspaper article describing police units designed to pull guns off the streets noted that they, too, often give themselves names and slogans evoking masculine domination and sovereignty: "[I]n Hollywood, Fla., they're called the 'Raiders.' In Charleston, W. Va., they're the 'Four Horsemen.' New York's [Special Crime Unit] brags, 'We own the night.'"⁶⁵ The ideology of brotherhood, a bond that surpasses all other social ties, helps make sense of the oft-discussed "blue wall of silence," which causes law enforcement officers to close ranks against any sort of outside investigation.

Finally, the hypermasculine culture of policing is reflected in the treatment of women by many police officers, both on and off the job. The NCWP reports that, as of 1998,

[e]ight out of ten municipal police agencies with the largest percentage of sworn women officers are currently under, or have been under, consent decrees to hire women or minorities. . . . This demonstrates that nearly all of the largest gains for women in policing have been achieved only as a result of lawsuits initiated by women in law enforcement and women's organizations to force agencies to hire more women or minorities.⁶⁶

Sexual harassment of women within police departments is reportedly rampant. As in other working-class, predominantly male work environments, police departments are often characterized by the stuff of which "hostile environment" sexual harassment suits are made: pornography, attempts at inappropriate touching, and hostile sexual joking and teasing.⁶⁷ The report of the Los Angeles Police Commission released after examination of the Mark Fuhrman tapes confirmed the existence of a clandestine organi-

63. See, e.g., Devlin Barrett & Murray Weiss, *Feds Still Aiming to Tear Down Infamous 'Blue Wall of Silence'*, N.Y. POST, June 9, 1999, available in 1999 WL 18389837 (reporting that federal prosecutors conducted an investigation into the "Blue Wall of Silence" with respect to the Louima torture case); Kathleen Kenna, *Police Shatter 'Wall' of Silence*, TORONTO STAR, May 26, 1999, available in 1999 WL 19357175 ("The [Louima] case cracked the once inviolate 'blue wall,' the universal code among police from Toronto to Johannesburg to New York that bars officers from ratting on each other.").

64. See KATZ, *supra* note 14, at 123-24 ("[M]embers of street elites seem to draw on any bit of historical lore that recalls a pre-nineteenth century elite. . . . The fascination is with being, by birth, the natural heir to an elite status.").

65. Ron Scherer, *Elite Cops Under Fire for Excessive Force*, CHRISTIAN SCI. MONITOR, Feb. 19, 1999, available in 1999 WL 5377172; see also Donna de la Cruz, *Four N.Y. Cops who Killed Diallo Are Cheered by Fellow Officers*, REC. (Bergen County, N.J.), May 1, 1999, available in 1999 WL 7098975.

66. NCWP, *supra* note 17, at 2.

67. See MESSERSCHMIDT, *supra* note 12, at 181 (citing a recent study that found these types of "demeaning sexual harassment" to be the type women officers experience most frequently).

zation within the LAPD called "Men Against Women." According to two police force critics, "[T]his male-only rogue group's purpose [was] to wage an orchestrated campaign of ritual harassment, intimidation[,] and criminal activity against women officers with the ultimate objective of driving them from the force."⁶⁸ Given the dynamics of heterosexual hypermasculinity, it is not surprising that men perceived as gay are also particular targets for harassment. Messerschmidt, for example, describes several studies suggesting that "policing gay men may actually be central to routine police procedures and practices."⁶⁹

Sexual harassment is not the only problem in law enforcement agencies; so too is domestic violence. Indeed, the report of the NCWP indicates that law enforcement agencies have shown little or no commitment to investigating and punishing domestic violence. In fact, studies have found that as many as forty percent of male law enforcement officers commit domestic abuse themselves.⁷⁰

The hypermasculinity of policing leads to a culture in which violence is always just below the surface. Moreover, eruptions of excessive force and brutality at the street level are commonly condoned or excused by higher-ups. A recent report on police brutality issued by Human Rights Watch concludes: "Police or public officials greet each new report of brutality with denials or explain that the act was an aberration, while the administrative and criminal systems that should deter these abuses by holding officers accountable instead virtually guarantee them impunity."⁷¹ Elaborating on this point, the report states:

Police officers engage in unjustified shootings, severe beatings, fatal chokings, and unnecessarily rough physical treatment in cities throughout the United States, while their police superiors, city officials, and the Justice Department fail to act decisively to restrain or penalize such acts or even to record the full magnitude of the problem. Habitually brutal officers—usually a small percentage of officers on a force—may be the subject of repeated complaints but are usually protected by their fellow officers and by the shoddiness of internal police investigations. A victim seeking redress faces obstacles at every point in the process, ranging from overt intimidation to the reluctance of local and federal prosecutors to take on brutality cases. Severe abuses persist be-

68. Spillar & Harrington, *supra* note 60 (noting that the group was formed in the mid-1980s following a court order to increase the hiring of women officers).

69. MESSERSCHMIDT, *supra* note 12, at 182.

70. See NCWP, *supra* note 17, at 3.

71. HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* 25 (1998). For other commentary on the difficulty of taking legal action against police brutality due to institutional resistance, see generally Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753 (1993); Symposium, *Police Violence: Causes and Cures*, 7 J.L. & POL'Y 77 (1998); Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79 (1993).

cause overwhelming barriers to accountability make it all too likely that officers who commit human rights violations escape due punishment to continue their abusive conduct.⁷²

This lack of interest in controlling brutality signals that the line between brutality and "business as usual" is extremely fine. And police brutality is not random. It follows the vectors of power established in the larger society in which white dominates nonwhite and rich dominates poor. Police often, and not without justification, understand their charge as the protection of "nice" neighborhoods and "decent" people against those perceived to be a threat. In practice, this often means that male power and state power converge on the black and Latino "underclass."

Criminologist Benjamin Bowling, examining white racist violence in England, observes that the notion that men exercise sovereign power over the "turf" in which they live is conducive to the commission of racist violence in a climate where minorities are popularly thought to be invading neighborhoods and cheapening everyone's quality of life. "For white East Enders, East London is their 'natural' home, one over which they are able to exert a territorial imperative and which they act to defend."⁷³ In this dynamic, "private" white violence against people of color allies itself with the supposed interests of the sovereign state. Like soldiers, white racists feel that they are protecting the nation in a distinctively manly way.

The mirror image of this violence occurs when police departments have an antagonistic relationship to people of color. Police officers in poor urban minority neighborhoods may come to see themselves as "law enforcers in a community of savages, as outposts of the law in a jungle."⁷⁴ In such a situation, race, gender, and nation converge. "Us versus them" collapses into "us versus the nonwhites,"⁷⁵ and rogue police officers, like private perpetrators

72. HUMAN RIGHTS WATCH, *supra* note 71, at 1.

73. BENJAMIN BOWLING, VIOLENT RACISM: VICTIMIZATION, POLICING AND SOCIAL CONTEXT 230 (1998). For an investigation of racist aggression among young people as a way of "doing masculinity," see generally Jo Goodey, *Understanding Racism and Masculinity: Drawing on Research with Boys Aged Eight to Sixteen*, 26 INT'L J. SOC. OF L. 393 (1998).

74. Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER, RACE & JUST. 1, 17 (1997) (arguing that criminals as a class are racialized as nonwhite). A more psychoanalytically oriented reading of the discourse of criminal justice focuses on how criminals are frequently associated with dirt, filth, and excrement. See generally Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1994). In this rhetoric, police are society's garbage men, disposing of society's filth. This language converges with anti-black racism: Black people have traditionally been metaphorically associated with dirt and excrement as well. See generally JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970) (providing a psychoanalytic account of white racism).

75. Indeed, one commentator argues that the membership of law enforcement and military personnel in racist organizations is an overlooked policy problem. See generally Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079 (1996).

of hate violence, are provided with ample opportunity to prove not only their patriotism but also their masculinity.⁷⁶

The hypermasculine culture of policing helps explain how it is possible for African American police officers to be just as brutal and abusive toward African American citizens as white police officers. Like military work, police work offers individuals a chance at all the privileges of hegemonic masculinity in exchange for embracing and excelling at the job. It thus offers a powerful lure to African American men otherwise denied hegemonic masculinity; and because police work does not explicitly set whites against nonwhites, but rather law-abiders against lawbreakers, citizens against "scum," an African American police officer can experience full acceptance as a man without feeling that he has betrayed his race.⁷⁷

We are now in a better position to understand the logic of the feces-smeared broomstick that Officer Justin Volpe proudly displayed around the station house. Abner Louima was a direct threat to the masculinity of the officer he was thought to have assaulted; by extension, he was a threat to the masculinity of the officers in Volpe's unit and to the masculinity of New York's finest as a whole. Abner Louima was also a racialized threat: He stood for the black and brown people who constitute the presumed majority of the criminal element on New York City's streets and for the mindless savagery of black masculinity.⁷⁸ In challenging this threat, Volpe adopted a hypermasculine stance of his own. Sodomizing Louima—not using his penis but an even bigger "stick"—showed Louima who was the bigger man, who ruled the night. It also showed Louima the superiority of white masculinity, invigorated by a touch of savagery yet retaining the superiority of mastery and control.

I have argued that the concept of gender violence helps make sense of police brutality and of attacks like the one on Abner Louima. Though police

76. See Patton, *supra* note 71, at 756 ("The typical victim of excessive force is a young African-American or Latino male, from a poor neighborhood, often with a criminal record. Gays and lesbians, transients, drunks, and criminal arrestees are also common targets of abuse.").

77. According to public defender James M. Doyle, the fact that the actions of criminal justice professionals (including not only the police but also lawyers on both the prosecution and the defense sides) are backed by the power of the state and the authority of the law, combined with the opportunities for "doing masculinity" that these jobs provide, produces a social environment not unlike the classic colonialism described by such novelists as Joseph Conrad, Graham Greene, and Rudyard Kipling. His essay presents a phenomenological account of a particular form of masculinity—which he calls simply the "White Man"—and its emotional and moral attractions. Not the least of these attractions is the freedom and excitement of representing the Law in a world of "savages," "perps," and "scum." See generally James M. Doyle, "It's the Third World Down There!": *The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71 (1992).

78. Alfieri notes that Louima's immigrant status also carried a cultural meaning of inferiority. See Alfieri, *supra* note 8, at 1190 (noting that the sexualized racial violence against Louima "but-tresse[d] the armament of violence wielded by state agents (the white Volpe) against alien victims (the black/immigrant Louima)").

abuse is often analyzed through a racial lens, and correctly so, it is important to see as well the thread of hypermasculinity that runs through racism.⁷⁹ Acts of violence can be ways of doing race as well as gender. The notion of gender violence as a broader term than "violence against women" also brings to light the powerful currents of fear, hostility, and desire that run among men. Gender violence both set Officer Volpe against Louima and engaged the officer and his unit in a bloody community.

III. DISENGAGING THE CRIMINAL JUSTICE STATE FROM GENDER VIOLENCE

I have argued that gender violence is a product of contemporary masculine identity in the United States. One consequence is that gender violence against women and men is perpetrated on both sides of the law. A second, subtler consequence is that the very ubiquity of gender violence makes such violence on behalf of the state seem necessary and desirable. Both the criminals who break the law and the police and legislators who make and enforce it understand violence as the lingua franca of men, and in this masculine language, violence must be countered with more violence lest manhood be reduced or lost. The result is an arms race of punitive treatment perpetuated by the criminal justice state.

In the section that follows, I argue that the moral authority of the state is endangered by the convergence of gender violence and state power. The risk is that our social acceptance of, even romance with, gender violence will blind us to the violence of criminal justice by making it seem natural, normal, and necessary. Meanwhile, the state's investment in the logic of violent masculinity creates the potential for a protection racket in which security appears to lie in ever-escalating amounts of masculinized violence. The way out of this arms race is through attempts to disrupt the culture of hypermasculinity that pervades criminal justice. In the final section of this Commentary, I describe some ways in which the goal is already being pursued.

A. *Gender Violence and the Criminal Justice State*

In liberal democracies, the exercise of state violence, both in the domestic realm and in foreign relations, is justified by reference to the values of protection, security, and order. These values are indeed compelling: Everyone wants to be protected, and certainly neither political citizenship nor social happiness can be pursued without order and security. Yet the language of protection and security provokes a feminist suspicion that a deal with pa-

79. Jerome Culp, for example, in a personal communication by telephone, has made the intriguing suggestion that Officer Volpe used his hypermasculine self-presentation in part as compensation for a not-quite-white racial appearance.

triarchy has been made somewhere. Political theorist Wendy Brown argues that there is such a deal and that it is a two-part arrangement:

In the first [part], the state guarantees each man exclusive rights to his woman; hence the familiar feminist charge that rape and adultery laws historically represent less a concern with violations of women's personhood than with individual men's propriety over the bodies of individual women. In the second, the state agrees not to interfere in a man's family (de facto, a woman's life) as long as he is presiding over it (de facto, her).⁸⁰

Questioning the characterization of this arrangement as "security" begins to uncover gender violence perpetrated in the name of the state. Thus, as Charles Tilly suggests:

With one tone, "protection" calls up images of the shelter against danger provided by a powerful friend, a large insurance policy, or a sturdy roof. With the other, it evokes the racket in which a local strong man forces merchants to pay tribute in order to avoid damage—damage the strong man himself threatens to deliver. . . .

....

. . . To the extent that the threats against which a given government protects its citizens are imaginary or are consequences of its own activities, the government has organized a protection racket. Since governments themselves commonly simulate, stimulate, or even fabricate threats of external war and since the repressive and extractive activities of governments often constitute the largest current threats to the livelihoods of their own citizens, many governments operate in essentially the same way as racketeers.⁸¹

It is not necessary here to take the strong position that the state does not in fact provide security to its citizens and protect them from one another, or to assert that the criminal justice state is nothing more than a façade for institutionalized gender violence. As V. Spike Peterson puts it, the point is only that "states . . . are implicated in the reproduction of hierarchies and in the structural violence against which they claim to offer protection."⁸² If much of the violence of the criminal justice state emerges from state actors' own needs to prove their masculinity rather than from the necessity of preventing and punishing crime, then the criminal justice state is, in this sense, a protection racket.

80. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 189 (1995).

81. Charles Tilly, *War Making and State Making as Organized Crime*, in *BRINGING THE STATE BACK IN* 169, 170-71 (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985); see also V. Spike Peterson, *Security and Sovereign States: What Is at Stake in Taking Feminism Seriously?*, in *GENDERED STATES: FEMINIST (RE)VISIONS OF INTERNATIONAL RELATIONS THEORY* 31, 50 (V. Spike Peterson ed., 1992) (arguing that rethinking "protection" is crucial to addressing world security).

82. Peterson, *supra* note 81, at 51 (noting that the protection racket functions as something of a collective action problem: "[I]ndividual participants, making 'rational' choices to 'accept' protection, simultaneously act 'irrationally' by reproducing systemic dependency.").

The conflation of criminal justice with gender violence is facilitated by the public's own investments in the romance of hypermasculinity. As the inexhaustible appetite for books, movies, and television series about criminals, police, and criminal attorneys indicates, Americans have a fascination with criminal justice.⁸³ Moreover, although such propositions cannot be proved, I suspect that much of this fascination arises from our convergent fascinations with violence, race, and hypermasculinity.

The fictionalized criminal justice system endlessly examined in the popular media provides an ideal forum for the public enjoyment of violence. As I have argued elsewhere:

The imaginary clash between civilization and savagery in urban "jungles" seems to require violence, since violence is the only thing that savages and animals understand. Moreover, the high stakes of such a situation—after all, the social order itself hangs in the balance—seem to require extreme measures. In this way, the likening of criminals to savages and subhumans makes the violence of the state in the protection of the rule of law seem necessary and justified in order to protect not just order in the streets, but [also] the order of society itself, indeed all of civilization.⁸⁴

The violence dramatized in media portrayals of the criminal justice system may appeal to public tastes because it dramatizes the conflicts within heterosexual masculinity.⁸⁵ Or public enjoyment of representations of violence may have to do with the frustrations of living in a world in which freedom and choice are extolled; yet many people find themselves anything but free.⁸⁶ Here, the argument is that the obscure sense of shame, humiliation, and resentment at not having achieved enough, at being continually held "responsible" for one's circumstances, may result in rage and the desire to see someone pay.

Finally, another speculation about the popularity of gender violence when perpetrated by fictional cops is that the frequent portrayals of weary

83. For a variety of opinions on why and how depictions of violence are consumed as entertainment, see generally SISSELA BOK, *MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT* (1998); *WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT* (Jeffrey Goldstein ed., 1998).

84. Harris, *supra* note 74, at 17.

85. One aficionado of police action movies, for example, makes the intriguing suggestion that scenes of extreme male-male violence in these movies are the equivalent of the "come shot" in pornography. He suggests that viewers enjoy portrayals of men beating each other up because violence is the way certain male intimate relationships are consummated. See NEAL KING, *HEROES IN HARD TIMES: COP ACTION MOVIES IN THE U.S.* 199 (1999). King is not the only cultural critic to discern some element of masochism in white male identity. David Savran argues that, since the 1960s, white men have perceived themselves as victimized in various ways—by blacks, by women, by the government—and have embraced the fantasy that a real man is one who receives and absorbs incredible amounts of pain. See DAVID SAVRAN, *TAKING IT LIKE A MAN: WHITE MASCULINITY, MASOCHISM, AND CONTEMPORARY AMERICAN CULTURE* 190-95 (1998) (describing "reflexive sadomasochism" and its historical roots).

86. See WILLIAM E. CONNOLLY, *THE ETHOS OF PLURALIZATION* 41-74 (1995) (exploring society's desire to punish).

and hardbitten, yet heroic white law enforcement officers under siege provide an important vehicle for the contemplation of white masculinity at a time when white men feel they are an endangered species, "losing ground."⁸⁷

Regardless of its sources, however, one effect of the public appetite for depictions of gender violence in the criminal justice system is the perception that a certain amount of gender violence is necessary for law and order. Violence may indeed be necessary for society to exist. Yet the amount and kind of violence necessary to enforce the law and the amount and kind of violence necessary to sustain heteropatriarchal masculinity may not be identical. The public's taste for male gender violence confirms Fuhrman's vision of the police officer as someone who needs to "beat people down" and reinforces the tastes of citizens and politicians for more and more punitive treatment of criminals. But we should not confuse the necessary violence of the criminal justice state with the violence demanded of a certain kind of man.

B. *Separating State Violence from Gender Violence*

I have argued that the project of citizen protection against crime and disorder is hindered by the conflation of crime-fighting and gender violence. From the perspective of masculinity theory, the starting point for a solution is the founding assumption of gender theory: Most of what is important about masculinity and femininity is not innate, but rather is generated by social institutions and conventions. If masculine gender performances repeatedly take certain destructive forms, this is not because men are inherently bad but because social conventions take on a life of their own. The question is not how to alter men's nature, then, but what can be done to alter the connections between masculinity and violence.

87. See, e.g., KING, *supra* note 85, at 200-01. This fascination with white hypermasculinity does not necessarily mean uncritical celebration of the white tough guy. For example, cultural theorist Fred Pfeil argues that, in black-white buddy movies, a frequent pattern is one in which the white partner bestows upon the black partner a new virility while the black partner heals the white partner's spiritual sickness. In this scenario, white tough guys need the healing touch of racial otherness to be complete. See FRED PFEIL, *WHITE GUYS: STUDIES IN POSTMODERN DOMINATION & DIFFERENCE* 13 (1995). King points out that white movie cops are frequently made to repudiate racism, and occasionally sexism as well, as a requirement of their journey toward wholeness. See KING, *supra* note 85, at 115 ("White male cops come to stand upright if not tall in their communities when they repudiate the supremacy and exploitation upon which so much of their privilege rests, while they accept the support of others by their sides."). King also points out that movie cops are made to suffer for their hypermasculinity and their cynical individualism:

What domestic bliss most heroes find comes sporadically and toward the movies' conclusions The heroes' problems with domestic harmony stem from three unfortunate characteristics of cops' personalities and work lives: Cops neglect their families, bring danger by provoking criminals, and sport the hostile personalities of men skilled at little but murder.

Id. at 20.

1. *Rethinking criminal justice in theory.*

Scholars and policymakers, many concerned specifically with criminal justice, have recently begun to argue for the need to use social norms as well as legal rules in the project of influencing behavior.⁸⁸ The suggestion that violence is often a form of gender performance brings both good news and bad news to these efforts to take norms into account. The good news is that, as norm theory suggests, the expensive and disappointingly inefficient business of trying to control crime solely with more police, more laws, more punitiveness, and more prisons may not be our only chance for security. Rather, changing and reinforcing nonlegal norms can prevent some crimes and help to properly remedy others.

The bad news is that, as social constructionists have come to realize, the fact that something is conventional rather than innate does not necessarily make it any easier to change. If violent behavior often finds its roots in conventions of masculine gender performance, making a significant dent in America's violence problem may involve not merely changing norms about gun possession or lawbreaking, but altering the rules of gender itself—as feminists will testify, not exactly an easy task.

Nevertheless, the folly of our present criminal justice system has not blocked all ambitious thinking. For example, one project for revamping our

88. Recent interest in norms and criminal behavior appears in both academic and nonacademic settings. Several legal scholars—some of them with a particular interest in criminal justice—have urged policymakers to consider legal rules as only part, and perhaps not the most important part, of systems of social control. See generally, e.g., JACK BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998) (arguing that cultural information shapes individual behavior); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (examining how individuals resolve disputes in cooperative fashion); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (exploring the role that social influence plays in individuals' decisions to commit crimes and the role that the regulation of social meaning plays in determining the direction of social influence); Larry Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996) (exploring social norms, economics, and rational choice as a way of understanding behavior); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998) (arguing that law enforcement must exist as an equal partner with social programs in social organization improvement); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 L. & SOC'Y REV. 805 (1998) (surveying works that seek to enrich criminal law policy analysis by incorporating social norms). In addition, sociological work on the role of seemingly trivial signs of social disorder, such as broken windows and graffiti, in fostering crime in urban areas has helped inspire a movement in policing sometimes described as "order maintenance policing." This policing strategy, as adopted in New York City, holds that aggressive enforcement of "quality of life" laws—such as those prohibiting turnstile jumping, urinating in the streets, graffiti and vandalism, and loitering—will prevent more serious crimes from occurring by restoring law-abiders' confidence in urban environments and inhibiting would-be offenders. See generally GEORGE KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996). But see Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (concluding that, on the whole, the data does not support the broken windows hypothesis).

criminal justice system calls for replacing punitive justice with restorative justice. John Braithwaite, the author of *Crime, Shame, and Reintegration*,⁸⁹ defines restorative justice as

a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just. . . . "Crime hurts; justice heals": This captures the essence of the paradigm shift. It involves rejection of a justice that balances the hurt of the crime with proportionately hurtful punishment.⁹⁰

Attention to the dynamics of gender violence can help further the restorative justice project. Restorative justice advocates need to think about how their efforts may play out in the larger social web of gender, sexuality, race, and class power.⁹¹ The project of "healing" and "unifying" may be ineffectual if it fails to address the very real structures of power to which gender violence is sometimes a response. At the same time, recognition of much criminal violence in gender performance may help restorative justice proponents heal the communities they serve. At the very least, the conditions now exist for a fruitful conversation between the new proponents of norm theory and critical theorists who have for some time dedicated themselves to the project of changing deep-seated power relations of gender, race, class, and sexuality.⁹²

2. *Rethinking criminal justice in practice.*

The identification of gender violence as an endemic problem in policing suggests that ending pervasive police brutality requires not simply more punishment for "rogue" officers or a greater commitment to the vague idea of "community policing," but rather a disruption of the entire gendered culture of policing. A recent community policing initiative in New Haven,

89. JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989).

90. John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

91. For the suggestion that proponents of victim-offender mediation (VOM), a project often associated with restorative justice, have already failed to think deeply about racial power, see generally Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000).

92. One example of a grassroots effort to situate restorative justice principles within a larger context of resistance to racial and class injustice is the "Non-Traditional Approach to Criminal and Social Justice," developed by the Prisoners' Alliance with Community (PAC). PAC consists of inmates and parolees from New York State prisons who are involved in critical reading and study groups and community empowerment efforts. PAC's 1997 revised report argues, among other things, that a narrow focus on "rehabilitation" for individual black and Latino offenders ignores the political, economic, and cultural factors that helped generate crime in the offender's social environment. Thus, under PAC's approach, prisoners must both receive instruction on criminogenic socioeconomic conditions and engage in community service activities aimed at addressing those conditions. See Prisoners' Alliance with Community, *The Non-Traditional Approach to Criminal & Social Justice* 25-26 (1997) (unpublished manuscript) (on file with author).

Connecticut, provides an example of the kind of thoroughgoing practical changes that such disruption requires.

Nicholas Pastore served as chief of the New Haven Police Department from 1990 to 1997. His tenure is described by one observer in the following way:

To Pastore, the transition to community policing was an acknowledgment of the growing complexity of the role of the officer. It was no longer enough to be big, strong, male[,] and tough. Instead, reading, writing, talking, listening, solving problems, caring about people, being part of the community, being "nice" and acting respectfully to felons as well as to elected officials were now what the job was to entail and, therefore, what should be taught in the [police] academy.⁹³

K.D. Codish, recruited in 1992 to be the director of training and education at the New Haven Police Academy, brought her feminist values to the job of collaborating with Pastore. In order to "de-militarize" the academy, Codish and Pastore adopted the institutional model of a university. They replaced disciplinary calisthenics with assignments in research and writing, eliminated the physical training requirement, and turned trainees from "cadets" or "recruits" into "students." Codish even replaced militaristic and sexist language in police academy materials with gender-neutral language: "Police force" became "police department," "men" became "officers," "manning" became "staffing," and so on.⁹⁴

The substance of the curriculum changed as well. Codish reports:

Sergeant Proto and I added to the state's "human relations" inservice training requirements a course in the Yale Child Study Community Policing Program, which teaches our officers to identify and refer young witnesses of violence to a specially trained interdisciplinary crisis intervention team. With faculty from the Yale School of Medicine, we developed an inservice program on "special populations," exploring police interactions and referrals for citizens with memory and seizure disorders. We added inservice classes on problem solving and decision making, diversity, HIV/AIDS, and the Americans with Disabilities Act. We replaced mace, the nightstick[,] and blackjack with the less aggressive OC pepper spray and PR-24 defense baton as well as instruction in the non-violent Management of Aggressive Behavior (MOAB).⁹⁵

Finally, Codish attempted to alter the pool from which police officers were selected. Under her leadership, the police academy undertook a special program to recruit women, people of color, and sexual minorities.⁹⁶ Codish and Pastore also tried to break down the traditional "us against them" men-

93. K.D. Codish, *The New Haven Police Academy: Putting One Sacred Cow Out to Pasture or, Policing Others the Way You Would Have Others Police You 1* (1996) (unpublished pamphlet) (on file with author).

94. *See id.* at 2-3.

95. *Id.* at 4.

96. *See id.* at 4-5.

tality: The new recruitment slogan became "Police Others As You Would Have Others Police You."⁹⁷

It is not clear whether these efforts to "feminize" New Haven policing will have any lasting effect. Pastore left his position in a cloud of scandal in 1997, and the new chief of police is reportedly far more traditional minded.⁹⁸ But the New Haven initiative indicates that the masculinist culture of policing is not unassailable and suggests some practical ways to disrupt that culture. Like the theory and practice of restorative justice, the New Haven initiative points the way toward disentangling the criminal justice state from the practices of gender violence.

CONCLUSION

On October 7, 1998, twenty-one-year-old University of Wyoming student Matthew Shepard was discovered near death, his hands tied behind him, lashed to a pole four inches off the ground, his head propped on a fence rail, his face and head mangled by eighteen blows from a three-pound Smith & Wesson .357 magnum.⁹⁹ The world soon learned that Matthew Shepard was gay and his killers two straight men. His horrifying death galvanized gay and lesbian activists everywhere. Yet, investigating the killing, reporter Jo Ann Wypijewski concluded, "It's just possible that Matthew Shepard didn't die because he was gay; he died because [his attackers] are straight."¹⁰⁰ Wypijewski's angle on the killing is that it may have been less a hate crime in the conventional sense of animus toward a despised group or "lifestyle" and more about the "injuries of terror and humiliation" that stalk young working-class men in small-town America. She reports having the following conversation with a young heterosexual man in Laramie, a conversation that ends her article:

"If a guy at a bar made some kind of overture to you, what would you do?"

"It depends on who's around. If I'm with a girl, I'd be worried about what she thinks, because, as I said, everything a man does is in some way connected to a woman, whether he wants to admit it or not. Do I look queer? Will she tell other girls?"

"If my friends were around and they'd laugh and shit, I might have to threaten him."

"If I'm alone and he just wants to buy me a beer, then okay, I'm straight, you're gay—hey, you can buy me a beer."¹⁰¹

97. *See id.*

98. *See* Paul Bass, *Community Policing, Part II*, NEW HAVEN ADVOC., Feb. 20, 1997, at 5.

99. *See* JoAnn Wypijewski, *A Boy's Life: For Matthew Shepard's Killers, What Does It Take to Pass as a Man?*, HARPER'S MAG., Sept. 1999, at 61, 61-62.

100. *Id.* at 62.

101. *Id.* at 74.

Elaine Scarry writes that “physical pain has no voice, but when it at last finds a voice, it begins to tell a story.”¹⁰² The story that gender violence tells is about the pain of masculine identity. Wypijewski’s conversation suggests the possibility of another story, one that can be told without violence. The task for us as citizens is to find such a voice for the state, as well as for men who just want a quiet beer.

102. SCARRY, *supra* note 13, at 3.